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In the Supreme Court of the United States

October Term, 1946.

WABASH RAILROAD COMPANY, a corporation, *Petitioner,*

vs.

J. F. WILLIAMSON, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No. 763.

STATEMENT OF THE CASE.

Respondent feels that petitioner's statement is not sufficiently complete in all respects and supplements it by the following statement:

This is an action under the Federal Employers' Liability Act for personal injuries sustained by respondent, a head brakeman (hereinafter called plaintiff), when he jumped off one of petitioner's (hereinafter called defendant's) locomotives just before a head-on collision with another of defendant's locomotives on defendant's single track main line between Jameson and Gallatin, Missouri. The negli-

gence of the engineer and conductor of the train was admitted by defendant (R. 126). A verdict was returned by a jury in the trial court in the sum of $22,500.00 (R. 6). Thereafter said verdict was reduced by the trial judge to $17,500.00, and judgment entered thereon (R. 6 and 7). Thereafter, the cause was appealed by defendant to the Supreme Court of Missouri and upon hearing was affirmed by said court (R. 169-177). Timely motion for rehearing or to transfer the cause to the court *en banc* was filed by the defendant and was overruled (R. 178-188). From the rulings of the Supreme Court of Missouri, defendant seeks to have this Court grant a writ of certiorari.

The main point at issue before this Court is the question of whether the Supreme Court of Missouri placed a proper interpretation upon Rule 738 of the defendant, Wabash Railroad, said petitioner herein claiming that this rule placed the positive affirmative duty upon respondent, the head brakeman, of going over the head of the engineer and fireman by force, if necessary, and stopping the train.

Plaintiff was head brakeman on the crew of regularly scheduled freight train No. 92, operating from Iowa eastward through Missouri. The crew of which he was a member took charge of the train at Stanberry, Missouri, and consisted of J. M. Meck, an engineer of some 25 years' experience; Carson Adams, a conductor of years' experience; Mr. Ewing as fireman, John Hawkins as rear brakeman, and himself as head brakeman (R. 8-10, 49, 58, 59). Plaintiff's experience had been confined to acting as brakeman, never having acted as fireman or engineer. He had nothing to do with operating the engine or directing the engineer or fireman (R. 10, 12, 22).

Rules of defendant railroad company were introduced in evidence by plaintiff. Rule 865 provides that both passenger and freight conductors "are responsible for the

movement, safety and proper care of their train, and for the vigilance and conduct of the men employed thereon." Rule 99 provides that, "Conductors and enginemen are responsible for the protection of their trains." Rule 106 provides, "Both the conductor and the enginemen are responsible for the safety of the train and the observance of the rules, and, under conditions not provided for by the rules, must take every precaution for protection." Rule 835, applying to enginemen, provides, "They are jointly and equally responsible with conductors for the movement and protection of their trains, in accordance with the rules, but will be governed by the directions of conductors in the general handling of their trains, unless so doing would endanger their safety or require violation of the rules. When there is no conductor, they will have charge of the train and will be governed by the rules prescribed for conductors" (R. 16-17).

Pertinent parts of Rule 738, introduced by defendant, require men whose duties are connected with the movement of trains to "familiarize themselves with the rules governing duties of others as well as themselves and to be prepared, in case of emergency, to act in any capacity to insure safety." It further provides, "Trainmen, fireman and yardmen must remind their conductors or engine foremen and enginemen of the contents of the train orders, or the time of superior trains which must be cleared should there be occasion to do so" (R. 84-85).

Plaintiff testified that the conductor, engineer and fireman were "over him" (R. 15). The conductor had control of the operation of the train (R. 50, 73). Engineer Meck testified on behalf of defendant that he was in charge of the operation of the engine and the air valve, and the fireman was next in charge of the engine (R. 68). It was the fireman's duty to fire the engine, look out around curves,

watching the train, and to call the engineer's attention to train orders if he weren't complying with them (R. 63). It was the head brakeman's duty to look out for the safety of movement of the train, to look back and watch the train around curves, and call his attention to unsafe factors and anything he was overlooking (R. 62-63). L. A. High, superintendent of the defendant's Moberly division, testified for defendant that the conductor has general charge of the train, directs its movements, sees that the orders are proper and all members of the crew understand the orders alike; that the engineer is charged with the proper handling of the train under the instructions of the conductor, the handling of train orders, the observation of signals and the supervision of the fireman on the engine and others that are in contact with him; that it is the head brakeman's duties to frequently inspect the train while running, keep a general lookout ahead for signals, understand train orders, follow the direction of the conductor, and know what orders the train is moving under and that it is moving properly under orders (R. 82-83). The conductor has an air valve in the caboose with which he can slow or stop the train, the same as the engineer (R. 10, 50).

As the crew took over the train at Stanberry, all five members compared their watches with the standard time clock there. Each member of the crew except plaintiff was furnished a copy of train order No. 11, with address and text as follows:

> "To C. & E. No. 92
> No. 14
> No. 11 Eng. 698 wait at Gallatin until 2:15 a. m. Jameson until 2:35 a. m. for No. 92 Eng. 2063 No. 14 Eng. 699 Run 15 mins. late Stanberry to Gallatin (Signed) L. K. B. Conductor and Engineman must both have a copy of this order" (R. 13).

They all read the order together. It meant that regularly scheduled westward bound passenger train No. 11 was late and would wait for them at Gallatin until 2:15 a. m., and at Jameson until 2:35 a. m. This meant that their freight train must be in the clear at Gallatin by 2:10 a. m. if it was to meet the passenger train at that station. No. 11 was a first-class train and had a right to leave Gallatin at the time set out and go to the next place, which was Jameson. If the passenger train had not been late, the meeting point would have been at Jameson (R. 11, 12, 22, 23, 60, 61).

The time train 92 left Stanberry was not fixed. After leaving Stanberry, the train stopped at Darlington, Missouri, for the Burlington crossing, and at Pattonsburg to take coal and water. They left Pattonsburg at 12:49 (R. 9, 60). The west switch onto the sidetrack at Jameson is west of the station, and the east switch about 15 car lengths east of the station (R. 70). The sidetrack at Gallatin starts west of the station and runs west approximately a half mile (R. 50, 51, 70). It is 6.7 miles from the station at Jameson to the station at Gallatin. There are three curves between Jameson and Gallatin, the first about a mile and a half from Jameson, the second about four miles, and the third about a mile and a quarter from Gallatin. The last two were slow order curves with a 30-mile speed limit (R. 24, 25, 65). The track is straight with no obstruction for a mile west of Gallatin (R. 51).

As the train approached Jameson, plaintiff was sitting on the left side of the cab beside the boiler, the fireman was sitting behind him and the engineer was sitting on the right side of the cab (R. 14). As the train was approaching the west switch at Jameson, the engineer did not slow down or stop, and the conductor did not attempt to slow down or stop. Plaintiff looked at his watch and saw that it was 2:05 a. m. and called to the engineer and

said, "John, we can't make it." The engineer looked at his watch and said, "I've got plenty of time. We can make it easy." The fireman looked at his watch and put it back in his pocket without saying anything, and got down and started to put in a fire, and the conductor did nothing about pulling the air (R. 14, 23, 24, 60, 61). When plaintiff spoke to the engineer, there was time to slow down or stop and go onto the side track at Jameson (R. 70). There was no speedometer on the engine, but plaintiff estimated their speed at about 50 miles an hour (R. 13-15), and the engineer at 40 miles per hour (R. 60). When the engineer told plaintiff he had plenty of time, and the fireman looked at his watch and got down to fire the engine, and the conductor did not put on the air, and he saw their speed, the plaintiff thought that they would make it all right because they were "over him", and there was nothing he could have done with the engine (R. 15). About a mile before the accident the engineer slowed down for the third curve, although in all probability he would have made it to the switch on the west side of the Gallatin station if he had not slowed down (R. 15-16). Plaintiff was sitting in his seat in the cab looking ahead, and they were on the straight part of the track going into the last curve when he saw a reflection of the headlight of passenger train No. 11 on the east side of the curve, and yelled "headlight" to the engineer, who leaned out, saw the light and immediately applied his air and the train began to slow down. The fireman jumped off, and plaintiff got off his seat and came back and unhooked a canvass curtain between the tank and cab on the left side, turned around, backed down the steps, and swung off, and was thrown to the ground and injured. The engineer followed him off the engine (R. 12-16, 65-66). Their engine was going about ten miles per hour at the time the engines collided (R. 66).

J. M. Meck, the engineer of No. 92, testified that as they approached the west switch at Jameson, Williamson said, "You can't make it," or "Can you make it, John?" And he looked at his watch and misread it and figured it was 2:03, and said, "Oh, yes, we can make it easy"; and plaintiff and the fireman looked at their watches (R. 60-61). He admitted that if it had been 2:03 he couldn't have gotten into Gallatin by 2:10, but would have gotten clear by 2:14 (R. 83). He conceded that even if the time had been correct he would have been encroaching on the time of No. 11 without authority (R. 72-73).

The engineer testified that the head brakeman had "no duty only just to sit there and look out", and to call his attention to something he was overlooking (R. 63). After plaintiff had called his attention to the order and told him he couldn't make it, and he said that he had plenty of time, plaintiff's only other duty was to "reach for a fusee and prepare himself for the duty of flagging in the event of an accident" (R. 63-64). He (the engineer) was in charge of the locomotive and the air valve, and if anything became the matter with him the fireman was next in charge (R. 68). He never asked the fireman or Williamson what their watches said (R. 68-69). When there is going to be a collision, "you get off the engine to save your life", and that has been done for years (R. 69). It did not dawn on him that he had misread his watch until after the collision when he got back and talked to the conductor (R. 71). When he said that he had plenty of time the fireman *should* have said, "You can't make it, John", and even the brakeman could have said that (R. 71). The fireman "could have called his attention or he could have set the air brake, if necessary, and the brakeman could have done the same thing *if he wanted to*" (R. 73).

Defendant railroad held a hearing at which all the facts of the collision were fully inquired into. The defendant measured the fault of all the men and took into consideration the superior duty of the engineer and conductor, and punished them by discharging them from the service, while it gave the plaintiff a thirty-day suspension (R. 58, 68, 89-91).

SUMMARY OF ARGUMENT.

I.

The Supreme Court of Missouri placed a proper interpretation upon Wabash Rule 738 in holding that respondent performed his duty under that rule when he called the engineer's attention to the train order and the engineer understood and replied that he had "plenty of time to make it." The Missouri court properly held that the rule did not require respondent to usurp the authority of his superiors in charge of the train and take over and stop the train by physical force, if necessary. Since petitioner admitted that the conductor and engineer were negligent, and since respondent was guilty of no act or omission under the rule, the demurrer to the evidence was properly overruled.

Wilson v. *C. B. & Q. R. Co.*, 317 Mo. 647, 296 S. W. 1017.

**Hawthorne* v. *International Great Northern Ry. Co.* (Tex. Civ. App.), 63 S. W. (2d) 243.

**Hawthorne* v. *International Great Northern Ry. Co.* (Tex. Civ. App.), 90 S. W. (2d) 895.

**International Great Northern Ry. Co.* v. *Hawthorne* (Tex. Comm. App.), 116 S. W. (2d) 1056.

II.

No Federal question of substance requiring an interpretation of the Federal Employers' Liability Act is presented, since respondent did not violate Rule 738 as alleged by petitioner, and no question of the application of the "primary duty rule" or the effect of *Tiller* v. *At-*

*No official reports.

lantic Coast Line R. Co., 318 U. S. 54, 63, 87 L. Ed. 610, 615, on that rule is involved.

Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 Law. Ed. 244, 49 Sup. Ct. 91.
Davis v. *Kennedy*, 266 U. S. 147, 69 Law Ed. 212, 45 Sup. Ct. 33.
Tiller v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, l. c. 63, 87 Law Ed. 610, l. c. 615.
Southern Railway Co. v. *W. O. Gadd*, 233 U. S. 572, 34 Sup. Ct. 696.

III.

Respondent's Instruction No. 1, directing a verdict for the respondent, was properly given, because under the evidence respondent was guilty of no contributory negligence and petitioner's engineer and fireman were admittedly negligent.

State of Ohio ex rel. Seney v. *Swift & Co. et al.*, 260 U. S. 146, l. c. 149, 42 Sup. Ct. Rep. 22, l. c. 23.
International Great Northern Ry. Co. v. *Hawthorne* (Tex. Comm. App.), 116 S. W. (2d) 1056, l. c. 1058-59.
Unadilla Valley R. Co. v. *Caldine*, 278 U. S. 139, l. c. 141.
Davis v. *Kennedy*, 266 U. S. 147, 69 Law Ed. 212, 45 Sup. Ct. 33.
Frese v. *C. B. & Q. Ry. Co.*, 263 U. S. 1, 68 L. Ed. 131.
Unadilla Valley R. Co. v. *Dibble*, C. C. A. 2, 31 Fed. (2d) 239.

IV.

Petitioner's Instruction A, telling the jury that respondent "was guilty of negligence which contributed to cause whatever injuries he may have received," was properly

refused, because respondent did not violate Wabash Rule 738 as claimed by petitioner, and under the evidence petitioner's admitted negligence was the sole cause of respondent's injuries.

Young v. *Masci*, 289 U. S. 253, 261, 53 S. Ct. 599, 602, 58 L. Ed. 1145.
Rocco v. *Lehigh Valley R. Co.*, 288 U. S. 275, 53 Sup. Ct. 343.
(Authorities under Point I, *supra.*)

V.

The refusal of the Missouri court to grant a new trial because of the alleged mistake or perjury in the testimony of Dr. Casebolt was a matter of general local law, involving no interpretation of or right arising under the Federal Employers' Liability Act.

Central Vermont Railway Company v. *White*, 238 U. S. 507, 59 Law Ed. 1433, 35 Sup. Ct. 865, 866.
Louisville & N. R. Co. v. *Holloway*, 246 U. S. 525, 62 Law Ed. 867, 38 Sup. Ct. 379.

ARGUMENT.

I.

The Supreme Court of Missouri placed a proper interpretation upon Wabash Rule 738, and under such interpretation respondent fully performed all duties required of him.

Petitioner's sole basis for review rests upon the claim that the Supreme Court of Missouri placed an improper construction upon Wabash Rule 738. If the construction placed upon such rule by the Supreme Court of Missouri is correct, respondent performed his duty under said rule and could be guilty of no negligence whatsoever.

It is undisputed that the rules of petitioner placed upon the conductor and engineer equally and jointly the responsibility for the protection and safety of the train, the observance of rules and the vigilance and conduct of the men employed on the train. No rule placed any specific responsibility upon the head brakeman for the movement, operation, safety or protection of the train. (Rules 865, 99, 106, 835, R. 16-17.)

The next in position of responsibility after the conductor and the engineer was the fireman (R. 15, 16).

The only affirmative duty that Rule 738 placed upon respondent was to "remind the engineer of the contents of train orders, or the time of superior train which must be cleared, should there be occasion to do so." Respondent performed his duty under this rule when he called the engineer's attention to the train order and the engineer understood and replied that he had "plenty of time."

The engineer testified on behalf of defendant that after respondent had called his attention to the train order and he had told respondent that they had "plenty of time," respondent's only other duty was to "reach for a fusee and prepare himself for the duty of flagging in the event of an accident" (R. 63-64).

The petitioner claims that Rule 738 required respondent to go over the heads of his superiors, the engineer and fireman, and take charge of the locomotive by physical violence if necessary. The following part of the rule is made the basis of such claim:

> "Conductors, trainmen, yardmen, signalmen, operators and others whose duties are connected with the movement of trains, engines or cars, must familiarize themselves with the rules governing the duties of others as well as themselves, and must be prepared, in case of emergency, to act in any capacity to insure safety."

In denying that this was a proper construction of the rule, the Supreme Court of Missouri said:

> "We do not think appellant's construction of this rule is proper. This rule is plain and unambiguous. It requires all employees whose duties are connected with the movement of trains to familiarize themselves with the rules governing the duties of others as well as themselves, and to be prepared to act in any capacity to insure safety in case of an emergency. It is obvious that this rule means that if an employee is incapacitated to perform his duties due to sickness, death or other reasons, the next lower employee should step in and take over the incapacitated employee's duties. This rule does not mean that a subordinate employee should by force take over the duties of a superior employee. We have so ruled in construing a similar rule in the case of *Wilson* v. *Chicago, B. & Q. Railroad Co.,* 317 Mo. 647, 296 S. W. 1017. When respondent said to the engineer, 'John, we can't make it,' he called the engineer's attention to the train order, and the engineer understood, for his reply was to the effect that he could make it. Respondent thereby performed his duty under Rule 738 when he reminded the engineer of the contents of the train order" (R. 171-172).

It is obvious without citation of authority or argument that this construction of the rule is the only logical and sensible one. We call attention to the following additional factors in support of this:

1. The rule uses the words "*must be prepared,* in case of emergency, *to act* in any capacity to insure safety." (Italics ours.) The use of words "prepared to act" is significant. Had it been the purpose of the rule to require men "to act in any capacity to insure safety" without orders or directions from some superior official, the words "must be prepared * * * to" would have been omitted from the rule, and it would have unequivocally required them "to act."

2. Neither the engineer, the rear brakeman nor the respondent, the only members of the crew to testify, had ever heard of the interpretation for which the petitioner now contends.

The petitioner has cited no authority whatsoever to support the interpretation of the rule for which it contends in this Court. It has not shown wherein the opinion of the Supreme Court of Missouri in this respect conflicts with any decisions of this Court or any other court. Cases sustaining the Supreme Court of Missouri in its construction of the rule are:

Wilson v. *C. B. & Q. R. Co.,* 317 Mo. 647, 296 S. W. 1017.

**Hawthorne* v. *International Great Northern Ry. Co.* (Tex. Civ. App.), 63 S. W. (2d) 243.

**Hawthorne* v. *International Great Northern Ry. Co.* (Tex. Civ. App.), 90 S. W. (2d) 895.

**International Great Northern Ry. Co.* v. *Hawthorne* (Tex. Comm. App.), 116 S. W. (2d) 1056.

Taylor v. *A. T. & S. F. Ry. Co.,* 292 Ill. App. 457, 11 N. E. (2d) 610; cert. denied, 304 U. S. 560, 58 Sup. Ct. 942.

*No official reports.

II.

Since the Missouri Supreme Court properly held that respondent performed his full duty under Wabash Rule 738, no substantial Federal question is involved.

Petitioner seeks to have this Court grant a writ of certiorari on the theory that this case calls for the application of the so-called "primary duty rule," as set out in *Unadilla Valley Ry. Co.* v. *Caldine,* 278 U. S. 139, 73 Law Ed. 244, 49 Sup. Ct. 91; *Davis* v. *Kennedy,* 266 U. S. 147, 69 Law Ed. 212, 45 Sup. Ct. 33, and other cases.

Petitioner in all courts has conceded and admitted that the engineer and conductor were negligent in disregarding specific orders to wait at a given point until the train moving in the opposite direction had passed. The sole basis for seeking to apply the "primary duty rule" is the claim that Wabash Rule 738 placed a duty upon respondent to usurp the engineer's position and stop the train, and that his failure to do so was the sole and primary cause of his injury. It is obvious that the construction placed upon the rule by the Missouri Supreme Court is correct, and respondent performed everything required of him under the rule, so that the "primary duty rule" has no application.

Petitioner seeks to inject a "Federal question of substance" into the case on the theory that certain language employed by this Court in the case of *Tiller* v. *Atlantic Coast Line Railroad Co.,* 318 U. S. 54, l. c. 63, 87 Law Ed. 610, l. c. 615, is in conflict with prior decisions of this Court applying the "primary duty rule." Since the respondent in this case fully performed all that was required of him under the rule in question, it follows that the question of whether "violation of a company rule became assumption of risk" is not here involved. No

question of the interpretation of the Federal Employers' Liability Act as amended is at issue in the case. The only questions involved are those of general law, and in view of the proof, the request that the trial court take the case from the jury was absolutely without merit. The petitioner fails to meet the requirements of Sec. 237 of the Judicial Code of the United States as amended, Sec. 344, U. S. C. A. It does not reveal that "a Federal question of substance" is involved, as required by Rule 38, Revised Rules of the Supreme Court of the United States.

This Court will not review a case where the Federal questions presented are trivial. *Southern Railway Co.* v. *W. O. Gadd,* 233 U. S. 572, 34 Sup. Ct. 696.

III.

The Supreme Court of Missouri properly upheld respondent's Instruction No. 1, because petitioner admitted that the conductor and engineer were negligent and no issue of proximate cause was raised by the pleadings or the evidence.

Instruction No. 1, given by the trial court on behalf of plaintiff, is as follows:

> "Under the law and the evidence it is your duty to render a verdict for Mr. Williamson and against the Wabash Railroad Company, and determine and fix the amount of recovery in accordance with other instructions herein" (R. 129-130).

The only objection made at the time this instruction was offered is as follows: "We object to that requested instruction, Instruction No. 1, because it fails to take into consideration the question of proximate cause" (R. 130).

Petitioner asserts that this instruction is erroneous because respondent's conduct in violating Rule 738 was the

sole cause of his injuries. This question has been completely disposed of under Points I and II, *supra.*

In addition, petitioner claims that it ignores the issue of whether respondent could have seen the approaching train in time to require the engineer to stop and avoid respondent's injuries. This issue was not injected into the case in the trial court, but was raised for the first time on appeal. In passing on this assignment of error, the Missouri Supreme Court said:

> "We have already held that respondent's injuries were not the result of his violating any rule of the company. The record convinces us that that was the sole contention of appellant; that is, that respondent violated rule 738. Appellant's only objection to this instruction when it was given was that it failed to take into consideration the question of proximate cause. * * * Likewise, appellant did not try the case on the theory that respondent failed to perform his lookout duty by observing the oncoming train in time to avoid the collision. It was not disputed that he was on the seat in front of the fireman looking ahead and the train was on the straight track going into the curve when respondent saw the reflection of the headlight of the passenger train and immediately yelled, 'Headlight'. Since the case was tried on a theory in which the question of proximate cause was not an issue, it was unnecessary to submit that issue to the jury" (R. 172-173).

Petitioner has cited no authority to sustain its position that this holding is in conflict with any holdings or decisions of this or any other Court. This Court has held, "Generally, at least, suitors may not maintain a position here which conflicts with that taken below * * ". *State of Ohio ex rel. Seney* v. *Swift & Co. et al.,* 260 U. S. 146, l. c. 149, 43 Sup. Ct. Reporter, 22 l. c. 23. Petitioner did not contend below and does not contend in this Court that

the failure of respondent to see the oncoming engine in time to cause his engineer to stop and avoid the collision constituted the direct primary cause of his injuries. Petitioner did not offer to submit this to the jury as an issue of fact (R. 133-136).

Under the authorities cited by petitioner, the sole proximate cause of the collision as a matter of law was the failure of the conductor and engineer to do what they knew they ought to do.

In *Unadilla Valley R. Co.* v. *Caldine*, 278 U. S. 139, l. c. 141, this Court said:

> "A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act."

In denying recovery to the personal representatives of deceased engineers who proceeded in violation of positive train orders, this Court and the district courts have held that the failure of other employees to prevent their violation of rules *cannot even constitute contributing acts of negligence.*

> *Davis* v. *Kennedy*, 266 U. S. 147.
> *Frese* v. *C. B. & Q. Ry. Co.* 263 U. S. 1.
> *Unadilla Valley Ry. Co.* v. *Dibble*, C. C. A. 2, 31 Fed. (2d) 239.

The above cases are authority for the holding in the present case that the admitted joint and concurrent negligence of the engineer and the fireman was the sole proximate cause of the casualty.

In the similar case of *International Great Northern Railroad Co.* v. *Hawthorne* (Tex. Comm. App.), 116 S. W. (2d) 1056, l. c. 1058-59, cited *supra*, it was held that when

the conductor admittedly misread his time table, and failed to take a sidetrack to avoid a head-on collision with an approaching scheduled train, and the fireman was injured when he jumped from the locomotive before the collision, it would be proper to instruct the jury that defendant was guilty of negligence proximately causing the injuries as a matter of law.

IV.

The Supreme Court of Missouri correctly held that petitoner's Instruction A was properly refused, because the admitted negligence of the conductor and engineer was the primary and sole cause of the collision.

Petitioner's Instruction A, refused by the court, sought to tell the jury that respondent "was guilty of negligence which contributed to cause whatever injuries he may have received." Petitioner contends that this instruction should have been given because respondent violated Rule 738. It has heretofore been pointed out that respondent performed all required of him under this rule and was guilty of no negligence.

Petitioner for the first time now claims in this Court that respondent was guilty of negligence as a matter of law in failing to see the approaching train in time to require the engineer to stop and avoid his injuries. This question was raised neither in the trial court nor in the Supreme Court of Missouri (R. 172). It will, therefore, not be considered in this Court. *Young* v. *Masci,* 289 U. S. 253, 261, 53 S. Ct. 599, 602, 58 L. Ed. 1145.

Under Point III, *supra,* it has been pointed out that respondent was guilty of no negligence that entered into and formed part of the proximate cause of his injuries. If it could be said that there was any evidence of negligence on his part, it would have been an issue of fact for

the jury and not a question of law for the court. *Roc* v. *Lehigh Valley R. Co.*, 288 U. S. 275, 53 S. Ct. 343, a authorities cited *supra* under Point I. Petitioner, aga has cited no authority to sustain its position on t point.

V.

Petitioner's assignment of error as to the Missouri cou failure to sustain defendant's motion for new trial because the testimony of Dr. M. B. Casebolt does not raise a quest reviewable in this Court.

Petitioner seeks to charge the Missouri court with er because it refused to grant a new trial for alle mistake or perjury in the testimony of one of respo ents doctors, M. B. Casebolt. This assignment involves construction of the Federal Employers' Liability Act, raises a question of general local law. Such a question not be considered by this Court. In *Central Vermont R way Company* v. *White*, 238 U. S. 507, 59 Law Ed. 1 35 Sup. Ct. 865, 866, this Court said:

> "Some of the assignments in the present case re to matters of pleading; others to the admissibility evidence, to the sufficiency of exceptions, and various rulings of the trial court which involve construction of the Employers' Liability Act, which, therefore, cannot be considered on writ error from a state court. *Seaboard Air Line R. C Duvall*, 225 U. S. 477, 486, 56 L. Ed. 1171, 1175 Sup. Ct. Rep. 790."

See also:

> *Louisville & N. R. Co.* v. *Holloway*, 246 U. S. 62 Law Ed. 867, 38 Sup. Ct. 379.

The Supreme Court of Missouri fully considered this assignment, determined it according to the local law, and its ruling on this discretionary matter is final and conclusive (R. 174-175).

Wherefore, respondent respectfully submits that the opinion and judgment of the Supreme Court of Missouri is correct in every respect, no Federal question of substance is involved, and the petition should be summarily denied.

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WALTER A. RAYMOND,
Counsel for Respondent.

TRUSTY & PUGH,
GUY W. GREEN, JR.,
Of Counsel.